82-2123

NO.___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

W. THOMAS PLACHTER, JR.
and PETER J. SERUBO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the dismissal of an indictment because of repeated, deliberate, and flagrant acts of prosecutorial misconduct before a grand jury falls within the scope of Section 3288 or 3289 of Title 18 of the United States Code, 18 U.S.C. §§ 3288, 3289, so as to permit reindictment of a defendant after the otherwise applicable statute of limitations has run.

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The Petitioners, W. Thomas Plachter, Jr. and Peter J. Serubo, respectfully pray to this Honorable Court that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in these proceedings on April 28, 1983.

I. OPINIONS BELOW

While no opinions were rendered by the United States Court of Appeals for the Third Circuit in the instant proceedings, the opinion of that Court in an earlier, related appeal is reported at 604 F.2d 807 (3d Cir. 1979). The unreported Judgment Orders of the Court of Appeals appear in the Appendix for Petitioners submitted hereto commencing at page 1. The Memorandum opinion of the United States District Court for the Eastern District of Pennsylvania appears in the Appendix for Petitioners commencing at page 5, and is reported at 502 F. Supp. 288 (E.D. Pa. 1980).

II. JURISDICTION

The Judgment Orders of the United States Court of Appeals for the Third Circuit were entered on April 28, 1983. The instant Petition for a Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

Section 3288 of Title 18 of the United States Code, 18 U.S.C. § 3288, which provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

Section 3289 of Title 18 of the United States Code, 18 U.S.C. § 3289, which provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, before the period prescribed by the appli-

cable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

IV. STATEMENT OF THE CASE

On March 13, 1978, Petitioners W. Thomas Plachter, Jr. ("Plachter") and Peter J. Serubo ("Serubo"), along with their co-defendant Donald H. Brown ("Brown"), were indicted by a federal grand jury for various counts of violation of the income tax laws and conspiracy. Plachter and Serubo were both charged with six counts of attempting to evade income taxes pursuant to 26 U.S.C. § 7201 and one count of conspiracy to defraud the Government and to attempt to evade income taxes pursuant to 18 U.S.C. § 371. Brown was charged with three counts of aiding and abetting and one count of conspiracy. The allegations of the indictment concerned Plachter's and Serubo's personal federal tax returns for the calendar years 1971 through 1973 and the returns of the Plachter-Serubo Cadillac Company ("the Company") for the same period. At their arraignments, all defendants entered pleas of not guilty to the counts in the indictment.

After the indictment had been returned, the defendants, based on certain materials obtained through limited discovery ordered by the United States District Court for the Eastern District of Pennsylvania and an

evidentiary hearing, moved to dismiss the indictment. These motions were based, *inter alia*, on the fact that the prosecutor had flagrantly abused the grand jury process.

These and other pretrial motions were denied by the District Court in late August and early September, 1978. *See United States v. Serubo*, 460 F. Supp. 689 (E.D. Pa. 1978) (per Newcomer, J.). On September 5, 1978, the defendants, by this time in possession of certain grand jury transcripts that had been furnished to them under a *Brady* request, *see Brady v. Maryland*, 373 U.S. 83 (1963), moved the District Court to reconsider its denial of their motions to dismiss based on the prosecutorial misconduct disclosed by those transcripts. Following oral argument on September 6, 1978, and after reviewing the grand jury testimony of only ten (10) of a total of approximately fifty (50) witnesses, the District Court found that the questioning of those witnesses by the prosecutor was "inconsistent with the standards laid down by the American Bar Association and was generally improper, reprehensible and unacceptable" and that there was "unprofessional, improper, and unacceptable conduct on the part of the prosecutor." *See United States v. Serubo*, 604 F.2d 807, 815-16 (3d Cir. 1979). Nevertheless, the District Court refused to dismiss or quash the indictment and refused to order discovery and inspection of the entire transcript of the grand jury's proceedings. *Id.* at 816.

After the District Court had denied these motions, Plachter and Brown pleaded guilty to the counts in the indictment against them, preserving, however, their right to appeal certain pretrial rulings as permitted by *United States v. Moskow*, 588 F.2d 882 (3d Cir. 1978), and *United States v. Zudick*, 523 F.2d 848 (3d Cir. 1975). The case against Serubo went to trial, but, before it was submitted to the jury, he too entered a conditional

guilty plea to some of the counts against him in exchange for the dismissal of the remaining counts.

Final judgments of sentence were entered against all defendants on November 3, 1978, and Plachter, Serubo and Brown thereafter appealed from the judgments of sentence entered against them.

On appeal, the United States Court of Appeals for the Third Circuit vacated the judgments of sentence that had been entered against the defendants. *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) (per Gibbons, J.). In so doing, the Court of Appeals made its own findings regarding the prosecutorial misconduct that had occurred before the grand jury, characterizing the misconduct of the prosecutor as "extreme," and stated:

> The graphic and misleading reference to Cosa Nostra hatchet men, for example, was a blatant invitation to associate the defendants with a disfavored criminal class, and was inconsistent with the American Bar Association Standards Relating to the Prosecution Function. In particular, Pichini [the prosecutor] acted inconsistently with Standard 3.5(b), Relations with Grand Jury, admonishing that "[the prosecutor] should give due deference to [the grand jury's] status as an independent legal body," and that he "should not make statements or arguments in an effort to influence the grand jury action in a manner which would be inadmissible at trial before a petit jury." Certainly the reference to Frank Sindone's violent conduct and organized crime associations went far beyond what Standard 3.5 would permit. *See also* Standard 3.6(a). This conduct is fully as unsavory as that challenged in [*United States v.*] *Bruzgo* [373 F.2d 383 (3d Cir. 1967)] and [*United States v.*] *Riccobene* [451 F.2d 586 (3d Cir. 1971)]. And here, in addition, the partial transcript of the proceedings thus far released

> indicates that this conduct was only one of several instances of improper or borderline conduct before the grand jury.

Id. at 818.[1] *See id.* at 814-15.

The Court of Appeals remanded the case for consideration as to whether, *inter alia*, the prosecutorial misconduct displayed before a first, non-indicting grand jury had been repeated before or had otherwise tainted a second grand jury which actually returned the indictment. For purpose of the remand, the Court of Appeals ordered that the defendants be allowed to "examine the undisclosed transcripts of the second grand jury proceeding." *Id.* at 818-19. Finally, the Court of Appeals instructed that the proper remedy upon a demonstration that prosecutorial misconduct had tainted the second grand jury was dismissal of the indictment. *Id.* at 818.

On remand, the defendants filed with the District Court a supplemental motion for discovery which asked for that information to which the Court of Appeals stated they were entitled. They then renewed their motions to dismiss or quash the indictment.

On December 7, 1979, the District Court granted the defendants' discovery motion in part and ordered the Government to make available all transcripts of all of the proceedings before both grand juries, and the transcripts from the first grand jury that were provided to the second. *United States v. Serubo*, Crim. No. 78-0071, slip op. at 3 (E.D. Pa., Dec. 7, 1979) (per Newcomer, J.). The District Court also directed the Government to provide the defendants with any other evidence which showed

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1. Indeed, the misconduct of the prosecutor was of such an extreme nature that the Court of Appeals, in remanding the case for an evidentiary hearing, instructed the District Court, upon completion of the hearing, to furnish to the Attorney General of the United States copies of the transcripts reflecting prosecutorial misconduct so that the Justice Department could consider appropriate discipline. *United States v. Serubo, supra*, 604 F.2d at 819.

an evidentiary foundation for any of the questions which were challenged for lack of foundation, and granted defendants leave to depose the grand jury stenographer as to off-the-record proceedings. *Id.*

The Government chose not to fully comply with the District Court's Order of December 7, 1979. Instead, based upon its claim that further proceedings to resolve the issues underlying the renewed motions to dismiss would be lengthy and might compromise the indicting grand jury's investigations of other matters, and would therefore not be "in the public interest," the Government "consented" to the defendants' renewed motions to dismiss on the grounds of prosecutorial misconduct. The Government, however, purported to limit its consent to a dismissal of the indictment "without prejudice."

On April 29, 1980, over opposition from the defendants who submitted that any dismissal of the indictment must be "with prejudice," the District Court entered an order dismissing the indictment "without prejudice." *United States v. Serubo,* No. 78-0071, slip op. at 1-2 (E.D. Pa., April 29, 1980) (per Newcomer, J.). The District Court, however, did find that prosecutorial misconduct similar to that which occurred before the first grand jury had occurred before the second grand jury as well:

> The Court finds that dismissal of the indictment is required because of prosecutorial misconduct before the indicting grand jury. Specifically, the attorney for the government failed to lay an evidentiary foundation in linking the defendants to organized crime; he commented unnecessarily on the veracity of witnesses; and certain of the misconduct that occurred before the first grand jury was presented by way of transcripts to the second grand jury.

Id. at 1.

On July 2, 1980, Plachter, Serubo and Brown were again indicted by a federal grand jury for various counts

of violation of the income tax laws and conspiracy. This second indictment against the defendants was identical to the earlier indictment that was returned on March 13, 1978. At their arraignments, all of the defendants entered pleas of not guilty to the counts of this second indictment.

On September 15, 1980, the defendants moved the District Court to dismiss the second indictment alleging, *inter alia*, that the charges contained in the indictment were barred by the applicable statute of limitations.

On November 12, 1980, the District Court denied the motions to dismiss, holding, *inter alia*, that the reprosecution of the defendants was not barred by the statute of limitations. *United States v. Serubo*, 502 F. Supp. 288 (E.D. Pa. 1980) (per Lord, Ch.J.). *See* Appendix for Petitioners at 5. In denying defendants' motions to dismiss, the District Court held that, although the statute of limitation applicable to the offenses charged in the indictment had in fact run, reindictment pursuant to 18 U.S.C. §§ 3288 and 3289 was permitted whenever the first indictment was dismissed "for any reason," and the dismissal of an indictment because of prosecutorial misconduct did not bar a timely reprosecution under those statutes. *Id.* at 289-90. *See* Appendix for Petitioners at 6-7.

Trial commenced before the District Court, sitting with a jury of twelve, on May 10, 1982. At the commencement of trial, defendant Brown pleaded guilty to the aiding and abetting counts in the indictment in exchange for the dismissal of the conspiracy count against him. On May 28, 1982, Plachter and Serubo were found guilty as to the counts of the indictment against them.[2] Plachter and Serubo thereafter filed motions for judg-

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2. Certain of the counts against defendant Serubo had been previously dismissed as a result of his plea agreement with the Government under the first indictment. *See United States v. Serubo*, 502 F. Supp. 290 (E.D. Pa. 1980) (per Lord, Ch.J.).

ments of acquittal and for a new trial, which motions were denied by the District Court.

On September 13, 1982, a final judgment of sentence was imposed upon Plachter. Plachter filed a Notice of Appeal on September 22, 1982, appealing to the United States Court of Appeals for the Third Circuit from that judgment of sentence. A final judgment of sentence was imposed upon Serubo on October 6, 1982, and Serubo thereafter appealed from that judgment of sentence to the Court of Appeals.

On January 6, 1983, the Court of Appeals consolidated the separate appeals of Plachter and Serubo for briefing and disposition on the merits. On April 28, 1983, following oral argument,[3] the Court of Appeals affirmed the judgments of the District Court. *See* Appendix for Petitioners at 1-4.

V. REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

The indictment against Plachter and Serubo charged violations of 26 U.S.C. § 7201 and 18 U.S.C. § 371, both of which are governed by a six-year statute of limitations. *See* 26 U.S.C. § 6531. The last overt act alleged in the indictment occurred on June 12, 1974.

The first indictment was dismissed by the District Court on April 29, 1980, which was less than six years after the last overt act alleged under the conspiracy and the charges regarding the Company's 1973 return and more than six years after the other substantive crimes alleged against Plachter and Serubo in that indictment. The second indictment was returned on July 2, 1980, more than six years after the last overt act alleged in the indictment and hence beyond the latest applicable limi-

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3. The transcript of the oral argument, which occurred on April 27, 1983, is set forth in the Appendix for Petitioners commencing on page 9.

tations date provided by 26 U.S.C. § 6531. Therefore, unless some provision operates to extend the otherwise applicable statutes of limitation, the charges in the second indictment are time-barred.

When an indictment is dismissed either because of an "error, defect or irregularity with respect to the grand jury," or because it is found "otherwise defective or insufficient for any cause," after the statute of limitations on the offense charged has expired, Section 3288 allows the Government to reindict a defendant within six months of the date of the dismissal. 18 U.S.C. § 3288. Where such a dismissal occurs before the expiration of the limitations period, Section 3289, Section 3288's companion provision, authorizes a similar six-month extension from the date the statute of limitations would otherwise expire.

Those statutes, however, are inapplicable to the circumstances of the case at bar. The egregious prosecutorial misconduct that triggered the dismissal of the initial indictment does not constitute the type of prosecutorial oversight or insufficiency contemplated by those "saving" statutes. Moreover, the Government's consent to the dismissal of the first indictment as "in the public interest" further removes this case from the coverage of Sections 3288 and 3289.

The issue decided by the Courts below, *i.e.*, whether prosecutorial misconduct of the degree which occurred in this case constitutes the type of defect with respect to the grand jury or with respect to the indictment itself that operates to relieve the Government from complying with the normally applicable statute of limitations, is an important question of federal law that goes to the integrity of the grand jury system and should be decided by this Court. Moreover, the decision that reindictment under Sections 3288 and 3289 is permissible whenever an initial indictment is dismissed literally "for any reason" represents such a radical departure from the accepted application of these sections as to warrant the exercise of

this Court's supervisory power. For these reasons, a writ of certiorari should issue to review the judgments of the Court of Appeals.

B. The Court Should Take This Opportunity to Settle the Issue of Whether the Dismissal of an Indictment Because of Repeated Acts of Extreme Prosecutorial Misconduct Falls Within the Scope of Section 3288 or 3289 So As To Permit Reindictment After the Otherwise Applicable Statute of Limitations Has Run.

1. Whether repeated acts of extreme prosecutorial misconduct constitute an "error, defect, or irregularity with respect to the grand jury."

Sections 3288 and 3289 provide, *inter alia*, that the statute of limitations will be extended for a period of six months "[w]henever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury. . . ." 18 U.S.C. §§ 3288, 3289. The Courts below implictly held that the error in this case, "extreme" and "unsavory" acts of prosecutorial misconduct, *see United States v. Serubo, supra*, 604 F.2d at 818, falls within that language of the "saving" statutes. That language, however, has never been so expansively interpreted.

All of the reported decisions permitting six-month extensions of the period within which reindictment must occur pursuant to the "error, defect, or irregularity" clause of the saving statutes have dealt with irregularities of a purely ministerial nature regarding the selection or convening of the grand jury returning the indictment or with technical violations of Rule 6 of the Federal Rules of Criminal Procedure.[4] The Second Cir-

4. *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (indicting grand jury lacked jurisdiction in that its term had expired

cuit has summarized the interpretative history of the tolling statutes:

> The six-month extension of time after the dismissal of an indictment is provided by 18 U.S.C. § 3288 and is available only if the dismissal is for *technical* defects or irregularity in the grand jury. *United States v. DiStefano*, 347 F. Supp. 442, 444-45 (S.D.N.Y. 1972); *United States v. Moriarty*, 327 F. Supp. 1045, 1047-48 (E.D. Wis. 1971).

United States v. Grady, 544 F.2d 598, 601 n.3 (2d Cir. 1976) (emphasis added).

In addition, the statutory language is expressly limited to "errors, defects, or irregularities" *with respect to the grand jury itself.*[5] *See, e.g., United States v. Hill,*

NOTE — *(Continued)*
prior to the handing down of the indictment); *United States v. Ponder*, 444 F.2d 816, 822 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (grand jury improperly constituted); *United States v. Newman*, 534 F. Supp. 1109, 1111 (S.D.N.Y. 1982) (unauthorized Special Assistant United States Attorneys in grand jury room in violation of Fed. R. Crim. P. 6(d)); *United States v. Hill*, 494 F. Supp. 571, 573 (S.D. Fla. 1980) (an indictment by an invalidly empaneled grand jury is an "error, defect, or irregularity" within the meaning of Section 3288); *United States v. Zirpolo*, 334 F. Supp. 756, 758-59 (D.N.J. 1971) (grand jury improperly selected); *United States v. Hoffa*, 196 F. Supp. 25, 31-32 (S.D. Fla. 1961) (limiting of selection of names for grand jury to registered voters, women volunteers for jury service in state courts, and jurors selected for service in state courts was improper and rendered indictment invalid).

5. Penal statutes must be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. *Busic v. United States*, 446 U.S. 398 (1980); *United States v. Scharton*, 285 U.S. 518 (1932). In addition, a criminal statute of limitations is to be construed liberally in favor of a criminal defendant. *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975); *United States v. Moriarty*, 327 F. Supp. 1045, 1047 (E.D. Wis. 1971). Accordingly, Sections 3288 and 3289, which are intended to extend the period of a criminal statute of limitations in favor of the Government, must be

494 F. Supp. 571, 573 (S.D. Fla. 1980) (an indictment by an invalidly empaneled grand jury is an "error, defect, or irregularity" within the meaning of Section 3288). The view of the Courts below, that this was simply another dismissal for a technical "error, defect, or irregularity with respect to the grand jury," expands the reach of the savings statutes beyond the area of prosecutorial *oversight* to encompass the area of deliberate prosecutorial *overreaching*. No evidence of congressional intent to give the statutes such a breathtaking scope is found in either the legislative history of Sections 3288 and 3289 or the plain language of the statutes.

2. Whether repeated acts of extreme prosecutorial misconduct render an indictment "otherwise defective or insufficient for any cause."

Sections 3288 and 3289 also provide that the statute of limitations will be extended for a period of six months whenever an indictment is dismissed on a finding that the indictment was "otherwise defective as insufficient for any cause." In permitting reindictment of the defendants in the instant case, the Courts below in effect held that a dismissal of the indictment on grounds of repeated acts of extreme prosecutorial misconduct before the grand jury meant that the initial indictment was "otherwise defective or insufficient" within the meaning of Sections 3288 and 3289. The statutory language, however, has never been applied to permit reindictment where a first indictment was dismissed because of such prosecutorial misconduct.

All of the reported decisions permitting six-month extensions of the period within which indictment must

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NOTE — *(Continued)*
strictly construed against the Government and liberally construed in favor of the defendants. *United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 (1939); *United States v. Moriarty, supra*, 327 F. Supp. at 1047.

occur pursuant to the "otherwise defective or insufficient for any reason" clause have dealt exclusively with two types of cases: (a) those in which the initial indictment was dismissed because of a technical violation of Rule 7 or Rule 8 of the Federal Rules of Criminal Procedure; or (b) those in which the initial indictment was dismissed as "insufficient" for failure to state an offense.[6]

Moreover, the statutory language is expressly limited to these cases where the indictment *itself* is "found otherwise defective or insufficient." There can be no claim here that the initial indictment in this case was "defective or insufficient." *See United States v. DiLorenzo*, 49 F.R.D. 86, 91 (S.D.N.Y. 1969), *citing*, *Costello v. United States*, 350 U.S. 359, *reh. denied*, 351 U.S. 904 (1956) (an indictment returned by a duly constituted grand jury is sufficient if valid on its face). On

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6. *United States v. Charnay*, 537 F.2d 341, 353-55 (9th Cir.), *cert. denied subnom., Davis v. United States*, 429 U.S. 1000 (1976) (failure to state an offense); *United States v. Porth*, 426 F.2d 519, 521-22 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970) (indictment dismissed as "defective and insufficient" for "technical reasons"); *Mende v. United States*, 282 F.2d. 881 (9th Cir. 1960), *cert. denied*, 364 U.S. 933, *reh. denied*, 365 U.S. 825 (1961) (indictment dismissed for "insufficiency"); *United States v. Kearney*, 451 F. Supp. 33, 39 n.3 (S.D.N.Y. 1978) (indictment dismissed as "'duplicitous" in violation of Fed. R. Crim. P. 8(a)); *United States v. Civic Plaza National Bank*, 390 F. Supp. 1342, 1344-45 (W.D. Mo. 1974) (indictment dismissed for failure to comply with Fed. R. Crim. P. 7); *United States v. Bair*, 221 F. Supp. 171 (E.D. Wis. 1963) (indictment dismissed as "duplicitous"); *United States v. Main*, 28 F. Supp. 550, 552 (S.D. Tex. 1939) (indictment failed to charge the commission of offenses against the laws of the United States").

With respect to *United States v. Civic Plaza National Bank, supra*, it should be noted that in that case, the District Court *strictly* construed Section 3288 in holding that a new prosecution can be instituted and avoid the bar of limitations only if it is instituted by an indictment, and a prosecution commenced by the filing of an information after an indictment has been dismissed was barred by the statute of limitations. *Id.* at 1344-45.

the contrary, the first indictment in this case was facially valid, and it was the "extreme" misconduct on the part of the prosecution which mandated the dismissal of that facially valid indictment. The language of Sections 3288 and 3289 simply may not be construed to expand the reach of those sections beyond cases where the *indictment itself* is defective or insufficient.

Because of the potentially far-reaching impact of the interpretation adopted by the Courts below upon the public perception of the integrity of grand juries, this Court should grant the instant Petition and review the judgments of the Court of Appeals.

C. The Decisions of the Courts Below Permitting Reindictment Pursuant to Sections 3288 and 3289 Whenever an Initial Indictment Is Dismissed "For Any Reason" Represent Such a Radical Departure From the Accepted Application of Those Statutes As to Warrant the Exercise of the Supervisory Power of This Court.

The District Court held that "if an indictment is dismissed *for any reason*, § 3288 can 'save' a timely reindictment." *United States v. Serubo*, *supra*, 502 F. Supp. at 289 (emphasis added).[7] *See* Appendix for Peti-

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7. The District Court's express reliance upon the decisions in *United States v. Charnay*, 537 F. 2d 341 (9th Cir.), *cert. denied sub nom., Davis v. United States*, 429 U.S. 1000 (1976), and *United States v. Macklin*, 535 F.2d 191 (2d Cir. 1976), as support for its broad interpretation of Sections 3288 and 3289 is misplaced in that the specific technical defects which mandated the dismissal of the initial indictments in those cases were clearly within the accepted meaning of the saving statutes. In *Charnay*, the Ninth Circuit, relying upon the "for any cause" language of Section 3288, broadly stated that "a second indictment may properly be returned within the prescribed six-month period where the dismissal of the first indictment is due to *a legal defect*. . . ." *United States v. Charnay*, *supra*, 537 F.2d at 355 (emphasis added). The first indictment in *Charnay*, however, was dismissed simply because it failed to state

tioners at 6-7. If it were the intent of Congress that Sections 3288 and 3289 should apply to all cases where an indictment is dismissed "for any reason," Congress would have said simply that and nothing more. The interpretation adopted by the Courts below renders meaningless all of the other qualifying words in the statutes and is a radical departure from the consistently strict interpretation of those statutes followed by other courts since their enactment.

For example, where an indictment is dismissed because of the Government's conduct in continually delaying the trial of the case, it has been held that there was no technical defect or irregularity as contemplated by the statutory language. *United States v. DiStefano*, 347 F. Supp. 442, 444-45 (S.D.N.Y. 1972).[8] Likewise,

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NOTE — *(Continued)*

an offense. This failure was exactly the type of technical error to which Section 3288 has been held to apply.

Similarly, in *Macklin*, the Second Circuit concluded that "§ 3288 was meant to apply whenever the first charging paper was vacated *for any reason whatever*, including lack of jurisdiction." *United States v. Macklin, supra*, 535 F.2d at 193 (emphasis added). The specific defect in *Macklin*, however, was precisely lack of jurisdiction; *i.e.*, the term of the grand jury which returned the original indictment had expired prior to the handing down of the indictment, and the original indictment was therefore a nullity. There, as in *Charnay*, the defect was exactly the type of technical error to which Section 3288 has been held to apply. The sweeping conclusion of the *Macklin* Court that Section 3288 applies whenever an indictment is dismissed "for any purpose whatever" is therefore dictum, and cannot be read to expand the scope of Sections 3288 and 3289 to the limits suggested by the Courts below.

8. In *United States v. DiStefano*, 347 F. Supp. 442 (S.D.N.Y. 1972), the District Court denied the Government's motion to reinstate a previously dismissed indictment after the five-year statute of limitations applicable to the charges against the defendant had expired, holding the six-month extension authorized by Section 3288 or 3289 inapplicable. Because the Government's own dilatory conduct had been the cause of the dismissal, the Court found that there was not a technical defect or irregularity as contemplated by those statutes:

dismissals of indictments effected at the Government's insistence and discretion are not controlled by Sections 3288 and 3289.[9] *E.g., United States v. Moriarty*, 327 F. Supp. 1045, 1047-48 (E.D. Wis. 1971).[10]

Thus, where a dismissal is due to intentional government conduct, such as the agreement to a dismissal "in the public interest,"[11] or the repeated pattern of mis-

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NOTE — *(Continued)*

> The motion must be denied because the statute of limitations having run, the Court is without power to reinstate the indictment. *When an indictment is dismissed because of technical defect or irregularity in the grand jury*, a new indictment may be returned within six months of the date of dismissal even though the statute of limitations has run or might run in the interim. 18 U.S.C. §§ 3288, 3289. However, *where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires. See United States v. Strewl*, 99 F.2d 474 (2d Cir. 1938), *cert. denied*, 306 U.S. 638, 59 S. Ct. 489, 83 L. Ed. 1039 (1939); *United States v. Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971).

Id. at 444-45 (emphasis added).

9. *See DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). When the Government seeks leave to dismiss an indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, neither Section 3288 nor 3289 applies. *United States v. German*, 355 F. Supp. 679, 682 (D.P.R. 1972). *See* 3 C.A. Wright, *Federal Practice and Procedure: Criminal* § 811 at 195 n.10 (2d ed. 1982).

10. In *United States v. Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971), the initial indictments had been dismissed upon the Government's declaration " 'that the interest of justice demands no further prosecution.' " *Id.* at 1047. The District Court refused to permit reindictment under Section 3288, holding that that statute embraced only dismissals on account of irregularities in the grand jury process, not those at the prosecution's behest as to the "interest of justice." *Id.* at 1047-48.

11. In view of the fact that the Government in the case at bar consented to the dismissal of the first indictment shortly after the District Court ordered extensive discovery, including the depositions of certain Special Agents of the IRS, other involved parties and

conduct present in this case, the courts have consistently held that the Government may not benefit from Section 3288 or 3289. The decisions below, therefore, represent a radical break from that consistent line of case law.

This departure warrants the exercise of this Court's supervisory power, and, accordingly, a writ of certiorari should issue to review the judgments of the Court of Appeals.

NOTE — *(Continued)*
the grand jury stenographer, *United States v. Serubo*, Crim. No. 78-0071 (E.D. Pa., Dec. 7, 1979) (per Newcomer, J.), it is inferable that the Government's consent to the dismissal of the first indictment was based more on a desire to avoid additional discovery, with its attendant risk of further exposure and embarrassment, as upon the "public interest." In either event, the Government's consent to the dismissal was not based on any defect or irregularity of the type contemplated by Sections 3288 and 3289.

In addition, the Government's consent to the defendants' motions to dismiss the first indictment rendered it not substantively different from a dismissal initiated by the Government pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. Rule 48 would have required the defendants' consent to the Government's request for a dismissal in that jeopardy had attached by virtue of the earlier pleas of guilty. *See, e.g., United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Young*, 503 F.2d 1072, 1074 n.5 (3d Cir. 1974); *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973). Likewise, Rule 48 requires approval by the Court of a Government initiated dismissal. Fed. R. Crim. P. 48(a). Accordingly, although there may be a distinction between the Government's consent to the defendants' motions to dismiss and its filing of a dismissal requiring the consent of the defendants and leave of Court, that distinction is one without a difference. Since Sections 3288 and 3289 do not control discretionary dismissals of this type, the second indictment should be considered barred by the statute of limitations. *See DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

VI. CONCLUSION

For the foregoing reasons, Petitioners W. Thomas Plachter, Jr. and Peter J. Serubo respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit.

Dated June 24, 1983

Respectfully submitted,

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A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

82 - 2123
No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

W. THOMAS PLACHTER, JR.
and PETER J. SERUBO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX FOR PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS OF APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1580

UNITED STATES OF AMERICA

v.

W. THOMAS PLACHTER, JR.,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-00203-02).

District Judge: Honorable Joseph S. Lord, III

Argued April 27, 1983

Before: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and BROTMAN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the applicability of Sections 3288 and 3289 is limited by the principles of statutory construction to cases involving specific errors or defects, (2) the applicability of Sections 3288 and 3289 is limited by their legislative and interpretive histories to cases involving technical errors and defects, (3) Sections 3288 and

*The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

3289 do not permit reindictment where the first indictment is dismissed for any reason, and (4) reindictment of the defendants pursuant to Sections 3288 and 3289 should not be permitted under the circumstances of this case.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/_____
Chief Judge

ATTEST:

/s/_____
Sally Mrvos, Clerk

DATED: Apr. 28, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1641

UNITED STATES OF AMERICA

v.

PETER J. SERUBO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-00203-01).

District Judge: Honorable Joseph S. Lord, III

Argued April 27, 1983

BEFORE: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and
BROTMAN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the court erred in ruling that the indictment was not barred by the Statute of Limitations, (2) the court should have granted the defendant's motion to suppress the seizure of his personal checks, (3)

* The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

the evidence failed to show that the defendant willfully attempted to evade payment of a tax, (4) the trial court improperly admitted evidence concerning matters for which Mr. Serubo was not on trial, and (5) the court improperly refused to act upon the government's prosecutorial misconduct, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/
Chief Judge

ATTEST:

/s/
Sally Mrvos, Clerk

DATED: April 28, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
-v-	:	CRIMINAL NO. 80-203
PETER J. SERUBO, W. THOMAS PLACHTER, JR. and DONALD H. BROWN	:	

M E M O R A N D U M

Joseph S. Lord, III, Ch. J. November 12, 1980

Defendants were indicted on March 13, 1978, Crim. No. 78-71, on numerous counts of tax fraud, and one count of conspiracy to commit tax fraud, in violation of 26 U.S.C. §§ 7201, 7206(2) and 18 U.S.C. § 371. On April 29, 1980, Judge Newcomer dismissed this indictment without prejudice. *United States v. Serubo,* Crim. No. 78-71 (E.D.Pa. April 29, 1980). *See United States v. Serubo,* Crim. No. 80-203, slip op. at 2 n.2 (E.D.Pa. Nov. 12, 1980) (Lord, C.J.) (*Zudick* plea bargain discussion). On July 2, 1980, a grand jury returned a second indictment, Crim. No. 80-203, charging almost identical violations of the Internal Revenue Code. Defendants move to dismiss this indictment, contending that it is time barred. For the reasons which follow, I will deny this motion.

The applicable statute of limitations is six years. 26 U.S.C. § 6531. However, under 18 U.S.C. § 3288, if an indictment is dismissed after the applicable statute of limitations has run, the Government has six months from the date of dismissal to reindict.[1] Defendants do

1. 18 U.S.C. § 3289 applies where the dismissal occurs before the applicable statute of limitations runs, but where the statute will run within six months of the dismissal period. It gives the Government six months from the date the statute would have expired to reindict. Here, § 3289 applies to the conspiracy count. The operative language in both sections is identical; accordingly my analysis of § 3288 applies to § 3289.

not dispute that the present indictment was brought within six months of dismissal. However, they argue that the saving clause applies only to indictments which were dismissed because of technical irregularities. When, however, the indictment is dismissed because of intentional prosecutorial misconduct, defendants argue that 18 U.S.C. § 3288 is not available to "assist" the Government.

Section 3288 states in pertinent part:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, *or an indictment* or information filed after the defendant waives in open court prosecution by indictment *is found otherwise defective or insufficient for any cause*, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information . . . .

18 U.S.C. § 3288 (emphasis added). The language is clear: if an indictment is dismissed *for any reason*, § 3288 can "save" a timely reindictment. The legislative history likewise supports this commonsensical reading. "The sections [§§ 3288 & 3289] concern cases where a new indictment is returned after a prior indictment has been dismissed, because of an error, defect, or irregularity with respect to the grand jury, *or because it has been found otherwise defective.*" [1964] U.S. Code Cong. & Ad. News 3257, 3258 (emphasis added).

In *United States v. Charnay*, 537 F.2d 341 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976) defendants similarly argued that § 3288 applies only if an indictment is dismissed because of technical defects or irregularity in the grand jury. After a thorough analysis of the statutory language and the appropriate legislative history, the Ninth Circuit stated: "While the first clause of § 3288 appears to be aimed at dismissal resulting from

irregularities in the grand jury, the second clause is much more general." *Id.* at 355. The court therefore held that the Government could reindict "where the dismissal of the first indictment is due to a legal defect." *Id. See also United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) ("§ 3288 was meant to apply whenever the first charging paper was vacated for any reason whatever . . . . ")

Defendants cite many cases to support their argument. However, none is dispositive. *United States v. Grady*, 544 F.2d 598, 601 n.3 (2d Cir. 1976) does state that § 3288 "is available only if the dismissal is for technical defects or irregularity in the grand jury." Yet the issue in that case involved the effect of a *superseding* indictment on an indictment which had been returned within the appropriate statute of limitations. The statute of limitations had already been tolled; there was thus no reason to rely on § 3288 in order to "save" reindictment. The *Grady* discussion of § 3288 is therefore dictum. Surely such dictum cannot be read as to overrule *sub silentio* the *Macklin* holding — another Second Circuit case.[2]

Defendants also cite *United States v. Moriarty*, 327 F.Supp. 1045 (E.D.Wis. 1971). *See also Grady*, 544 F.2d at 601 n.3 (citing and relying upon *Moriarty*). *Moriarty* did hold that "[s]ection 3288 is specific in its requirement that an otherwise time-barred count can be allowed only if the earlier dismissal related to irregularities occurring in connection with grand jury proceedings." 327 F. Supp. at 1047-48. However, the opinion did not fully quote § 3288, for it stated that "[p]rior to 1964, 18

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2. Defendants also rely on *United States v. DiStefano*, 347 F. Supp. 442 (S.D.N.Y. 1972). *DiStefano* narrowly held that "where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires." *Id.* at 444. However, the case predates *Macklin* and therefore has very slight precedential value.

U.S.C. § 3288 provided for reindictment, notwithstanding the running of the period of limitations, 'whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, *or is found otherwise defective or insufficient for any cause* . . . .' However, as presently worded, § 3288 allows reindictment, with one exception, only after dismissal of an indictment for 'error, defect, or irregularity with respect to the grand jury.' " *Id.* at 1047 (emphasis in original). As I noted, p. 2 *supra*, present § 3288 expressly provides for reindictment after dismissal "for any cause." *Moriarty* is therefore flawed because it ignored the pertinent words of the statute and thus did not adequately treat the statutory language. Hence I decline to follow it.[3]

I conclude that the plain language of §§ 3288 & 3289 applies. Consequently I hold that dismissal of an indictment because of prosecutorial misconduct does not bar timely reindictment pursuant to §§ 3288 & 3289. I will therefore deny defendant's motions to dismiss.

/S/ _____
Joseph S. Lord, III
Chief Judge

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3. In any event, the *Moriarty* holding was discussed and rejectd in the more recent Ninth Circuit *Charnay* opinion.

UNITED STATES OF AMERICA

v.

W. THOMAS PLACHTER, JR.

and

PETER J. SERUBO

APPEAL NOS. 82-1580 & 82-1641

Oral Argument

April 27, 1983

BEFORE:

JUDGE SEITZ, Chief Judge
JUDGE HIGGINBOTHAM, Circuit Judge
JUDGE BROTMAN, District Judge

APPEARANCES:

Counsel for Appellants	*Counsel for Appellee*
THOMAS A. MASTERSON (W. Thomas Plachter, Jr., Appellant in No. 82-1580)	WILLIAM C. BRYSON
F. EMMETT FITZPATRICK (Peter J. Serubo, Appellant in No. 82-1641)	

JUDGE HIGGINBOTHAM: Are we ready to proceed?

MR. MASTERSON: Yes, sir.

JUDGE HIGGINBOTHAM: Proceed.

MR. MASTERSON: If the Court please, my name is Thomas A. Masterson and I represent the appellant, Thomas Plachter. Pursuant to the Court's order, the ap-

pellants have been allowed 15 minutes. We propose to divide the argument, 10 minutes to myself, 5 minutes to my colleague, Mr. Fitzpatrick. I would like to start with 8 minutes opening and reserve 2 minutes for rebuttal.

JUDGE HIGGINBOTHAM: Granted.

MR. MASTERSON: Thank you, sir. In view of the limited time for argument in this case, I will spare the Court a recitation of the torturous history of this prosecution. It's set out in all of the previous opinions both by Judge Newcomber, this Court and Judge Lord.

The precise issue before this Court this morning is whether or not the saving statute, the provision of the savings statute, 18 USC 3288 and 3289, permit the reindictment of a defendant after the Statute of Limitations has run on the offenses for which he is indicted, when a first indictment was dismissed because of acts of prosecutorial misconduct which have been judiciously characterized by this Court as extremely unsavory, reprehensible and blatant. It is the defendant's position that neither the language of §3288 and 3289 nor the cases heretofore interpreting that language permit this result.

JUDGE HIGGINBOTHAM: Actually, would you concede that we have never — that there is no other case which has this precise factual situation in terms of the dismissal?

MR. MASTERSON: The reason for the earlier dismissal.

JUDGE HIGGINBOTHAM: Yes.

MR. MASTERSON: That is one of my major points of argument, sir. There is no such case and I submit to this Court there ought not ever to be such a case. And I think that that conclusion stems from an analysis of the language of the savings statute and the cases which were interpreted. I would like to take a moment, if I may, to parse the language of the statute with the Court and you can divide the operative language in either the two or three clauses. I prefer to divide it into three clauses

because I think the cases which have been decided under the act logically fall into three different categories.

The first phrase — operative phrase — is "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the Grand Jury." Now there are a number of cases that have interpreted that part of the act. All of those cases are cases where the first indictment was dismissed by reason of some technical violation of Federal Criminal Rule No. 6 relating to the organization and functioning of the Grand Jury. For example, in *United States* vs. *Macklin*, the first indictment was dismissed because it had been returned by the Grand Jury beyond the term of that Grand Jury. Then the other cases that are cited by both sides underneath that part of the statute which are *U.S.* vs. *Ponder*, *U.S.* vs. *Hill*, *U.S.* vs. *Zirpolo*, and *U.S.* vs. *Hoffa*, every one of those cases is a case in which the first indictment was dismissed because of the fact that the Grand Jury had been improperly impaneled either because blacks had been excluded or women had been excluded or whatever. But the gravemen of the quote "irregularity or defect with respect to the Grand Jury" was just that. It was a defect in the organization of the Grand Jury or a defect in the functioning of the Grand Jury.

Now, the next phrase in the statute is — or when an indictment is "found otherwise defective." All of the cases that logically fit under that phrase are cases in which the original indictment was dismissed by reason of a technical defect, principally a violation of Federal Criminal Rule No. 7, and in that connection I cite to the Court *U.S.* vs. *Porth*, *U.S.* vs. *Civic Plaza National Bank*, and *U.S.* vs. *Bair*. *Civic Plaza National Bank* is particularly interesting because the first indictment was dismissed because of a violation of Federal Criminal Rule No. 7 and then the government within six months — and that was a technical defect — and the government within six months proceeded by information and the

court there said the statute does not say you can recharge by information. It says you have to recharge by indictment. And since this is a criminal statute, we strictly construe it and information is not an indictment. The statute does not provide for it.

Now the final clause of the relevant language is an indictment which is found "insufficient for any cause." I submit to this Court that all of the cases which logically fall under that section of the statute are cases in which the indictment itself is defective in that — most of them, incidentally, are cases in which the indictment is defective because it fails to allege an offense. That is *U.S.* vs. *Charnay*, the Ninth Circuit case, the *Kearney* cases and *U.S.* vs. *Main*. In all of those cases where they said that the original indictment was "insufficient" it was insufficient because it failed technically to charge an offense and, therefore, fell below the standard required by Federal Criminal Rule No. 7. So —

JUDGE HIGGINBOTHAM: You have distinquished all of the cases admirably, but what is the policy reason as to why Mr. Plachter should be treated differently than the other cases?

MR. MASTERSON: Well, I think there is an obvious difference between a ministerial technical and an unintentional defect or error, and a previous indictment which was dismissed because this Court found that the federal prosecutor had blatantly, deliberately, wilfully violated the Fifth Amendment right of the defendant to an unbiased Grand Jury. I think there are obvious reasons to permit reindictment when the first error is not a result of a wilfull, deliberate and malicious act of the government. I don't think they are entitled to any grace.

JUDGE HIGGINBOTHAM: Let me give you this hypothetical.

MR. MASTERSON: Yes, sir.

JUDGE HIGGINBOTHAM: If what you're concerned about is the perniciousness of the government's conduct, then it seems to me that if you want to punish

or to react because of the perniciousness of the government conduct, then a prosecution should be precluded with or without this extension problem. If you want to have some type of symmetry, if what you're concerned about is the perniciousness of the process, then you should just preclude prosecution.

MR. MASTERSON: Well, I agree with that, Judge Higginbotham, and we argued that to this Court in an earlier appeal and this Court did not agree with that position. Therefore, the question arose as to whether under these circumstances the saving act should apply. Our initial position was we shouldn't even get to that because the indictment should be barred forever. But if you read the first and second, the first opinion of this Court and the judgment order in our second appeal, I think the conclusion is clear that the Court felt that the prosecutorial misconduct tainted the first indictment and, therefore, that should be dismissed. But then if the government had the right to go forward to indict an unbiased Grand Jury, it was not going to prevent that. So it didn't.

Our position before this Court today is the Government does not have the right to go forward because it does not come within the language or the decided cases under the savings act.

JUDGE SEITZ: Your argument reduces out the proposition Congress didn't intend to contemplate this situation.

MR. MASTERSON: Exactly. That is it in a nutshell. thank you, Chief Judge Seitz.

MR. FITZPATRICK: Good morning. My name is Emmett Fitzpatrick and I represent Mr. Serubo, and I had anticipated, because of the importance of the point raised by Mr. Masterson, really not arguing on the Statute of Limitations problem and will not do so. As a matter of fact, I frankly thought my time would be used up by Mr. Masterson and that would have been perfectly fine with me. I think the point is so important.

I want to apologize for an apparent oversight or misunderstanding of the Court's rules on my behalf. When the appendix was prepared, it was my understanding that the entire trial record would be available to the Court. From reading the brief of my opponent, he points out that that was not done because I did not order the transcript. I had assumed that that would have been available.

I would like to mention two other points that occurred that directly affected my client that I have raised in my brief. One is the item of his personal checks. In spite of the past history of this case which I was not part of until just recently, before the last trial before Judge Lord, no one ever discovered that the personal checks of my client for the years in question, '71 through '73, were voluntarily turned over by his accountant to the government. And they were done so according to the government's testimony through the consent of my client. My client never knew that. A hearing was held and he testified I had no recollection, no knowledge that these checks were turned over. He was questioned about where these checks were kept and he said, "These checks were kept by me at my home. I gave them to my accountant for one specific purpose, so that he could figure out an analysis and return them to me. I did not know that they ever went to the government."

The accountant testified that, well, he didn't really talk to my client about it. He assumed he had been given permission by someone and that he thought it was a good idea. There is a protective statute in Pennsylvania and the government cites I think quite properly *Couch* vs. *The United States*, but I would like to take the opportunity to distinquish that because, as I read that opinion, that opinion turned upon the fact that in *Couch* the checks had regularly been stored or turned over to the accountant and were kept by the accountant as opposed by the party. And I would urge upon this Court that the Internal Revenue Service, which makes such a thing

over representation that it requires a specific signed Power of Attorney on their forms before they will chat with you about anything, in this instance, had an obligation — if indeed they realized not upon summons, but upon the consent of the taxpayer, they had an obligation to assure themselves they had that consent.

I would also like to mention one argument in the prosecutorial misconduct allegation raised in Argument 5 of my brief and that concerns a confrontation between a disclosed defense witness and the government prosecutor during the course of trial. One of the defenses in this case as to why Mr. Serubo charged off things like personal clothing was that in running his business he had an incentive program for his salesmen whereby he would say if you sell four cars this week, I will give you this sportcoat off of my back. Now that may seem like a rather childish way to run a business, but he testified and people testified that indeed it had been productive for him. He had done it for some time. We had requested certain salesmen come in to present this fact to the jury. One of these was a gentleman named Dolan. And Mr. Dolan was approached in the lobby of this courthouse after I told the trial attorney that Mr. Dolan would be a witness and he was asked, as the testimony of the trial attorney indicates, why he signed a particular check. Now the check had been introduced in evidence. They had an opportunity to turn it over for handwriting analysis. That had never been done. And at the trial the testimony of the endorsee about which Mr. Dolan was questioned was characterized as completely illegible. Nobody knew what it said.

Mr. Dolan, of course, denied that, became visibly upset, produced his driver's license right there for an examination, if indeed that was at all necessary. And it was only after an awful lot of cajoling that Mr. Dolan did come in. We had other witnesses who we had hoped to be able to produce, although people who sell auto-

mobiles are not easy to get into a courtroom. They never appear and they were never able under those circumstances to come in. Now I cannot say to this Court there is a direct relationship. I wish I could prove it, but how you can prove why a witness who doesn't come in didn't come in, I really don't know.

Nonetheless, I would respectfully point out to this Court that in the 25 years I at least have stood before the bar of the Court, sidebar on more than one occasion, and had the prosecution say an anonymous telephone call was received by our main witness last night and we would like you to revoke the defendant's bail because we think he had something to do with it. There was no legitimate reason for the government to have approached that witness and approach him about that. They admitted that they did not say to him, "What are you here to testify for?" They accused him of being a part of this case and that is in my opinion prosecutorial misconduct designed to do nothing more than to discourage witnesses in a case where I think witnesses were of vital importance to the defense. Thank you.

THE COURT: Thank you. We will hear from the government now.

MR. BRYSON: May it please the Court, my name is William Bryson from the Department of Justice and I represent the government in this case. I would like to address principally the Statute of Limitations question. The statute in our view clearly covers with respect to either of its two main clauses a dismissal for prosecutorial misconduct. The first clause by its language, it's clear enough, "covers dismissals for any ethical error, defect or irregularity with respect to the Grand Jury." By its plain language, what happened in this case, prosecutorial misconduct before the indicting Grand Jury, constitutes an irregularity before the Grand Jury and is, therefore, within that term of the statute. But even if it is not within that language of the statute, there is a second clause of the statute that is a catchall clause

which says "When the indictment is found otherwise defective or insufficient for any cause . . ." — for any cause — ". . . that the tolling statutes, the grace period statutes shall be applicable." Now the language in our view is enough to settle the matter right there. But in fact, the legislative history, the case law and the policy behind the statute all point in the same direction which is that the statute should be applicable to this kind of case. Now it's true —

THE COURT: Is there anything — I have the impression that there is nothing in the legislative history which focuses on the precise issue of dismissals for prosecutorial misconduct.

MR. BRYSON: That's correct, your Honor. What the legislative history says, and I think there is an explanation for that, because back in the thirties when this was passed, by and large Grand Jury proceedings were not recorded. There wasn't the kind of focus on the Grand Jury process with respect to the prosecutors' conduct before the Grand Jury that there has been in recent years, following in part from this Court's decision in the first *Serubo* case, and that was not one of the claims that was commonly made. It wasn't the kind of claim that was typically made to attack an indictment. Accordingly, the Congress — neither Congress nor the Attorney General in recommending the statute made any explicit reference to that kind of error. But what the Attorney General did and what the statute did back in 1934 when it was first passed was to say we want to cover all cases in which there is an indictment which is pending which is dismissed and the Statute of Limitations would have run, but we want to cover those cases and make sure that it doesn't run, that you can reindict. And the language that the Attorney General used in his transmittal letter which the Supreme Court later said was adopted in virtually word for word in the statute was language that was intended to cover all cases.

If I can read the language that was used in the letter, that the tolling statute should apply "in any case in which an indictment is found defective or insufficient for any cause in any case". And the purpose that the Attorney General set out and the purpose that was set out in the legislative history and that was reiterated by the cases that were decided shortly after the statute was passed all point in the same direction. That is, to quote from the *Strewl* case, the Second Circuit, shortly after the statute was enacted, "The purpose is to prevent the failure of a prosecution because an indictment found in season proves insufficient in law." And again, in the *Strewl* case, the tolling statute is to apply after the defendant succeeds on demurer or motion to dismiss after the error can be corrected, it will not discharge the accused. In this case there was a new indictment. The error was corrected. There is no claim that the new indictment was in any way tainted by any of the prior proceedings or was itself invalid. The error was corrected. The tolling statute should apply.

Now it's true there is no case that is directly on point here, although there are cases that are close and the language from the leading cases in this area covers this case quite easily. And the language —

THE COURT: You may have made this point, but is my impression correct that until "modern times" there was no — basically this type of attack probably never could have been made?

MR. BRYSON: Except in the rarest cases, your Honor, that's right, because by and large Grand Jury proceedings were not recorded until I think the late seventies. The requirement that they be recorded was put into the statute. It was really not until that time that the proceedings in the Grand Jury became subject to close scrutiny. There were some occasional cases, the *Esteppa* case, for example, in which Judge Friendly criticized the use of hearsay testimony and dismissed an indictment when the reliance on hearsay testimony was deemed un-

duly extensive. But, by and large, it's really only been within the last 10 years in which — within the last five years, really, which these kinds of claims have been made.

THE COURT: Since I came on this court I can remember we had no record — Grand Jury record from certain districts.

MR. BRYSON: That's right, your Honor. I think only in the last five or six years has that been. Certainly it's only been in that period that it's been mandatory.

But in any event, the language of both the cases and the statute certainly extend to this kind of error which is, if I can point to a couple of cases, the *Macklin* case from the Second Circuit is the leading case and the language there is very broad. The Court said the purpose of the statute is not to let the wrongdoer escape because the error is discovered too late, and the case then went on to say that the tolling statute applies whenever the indictment is dismissed for whatever reason, for any reason whatsoever. And that certainly includes a dismissal such as the one in this case.

Now what the appellants are asking this Court to do is to restrict the application of this statute to "technical errors". Of course, the statute doesn't contain any reference to technical errors. There is no definition of technical error and in fact, as I understand their argument, the appellants really aren't providing any clear guidelines as to what constitutes a technical error, and I submit that this Court —

THE COURT: I am satisfied this particular error is not a technical error.

MR. BRYSON: Well, I think this error is not a technical error, certainly not as the appellants would invite this Court to define technical error.

JUDGE HIGGINBOTHAM: Well, you would concede it's not a technical —

MR. BRYSON: No. your Honor, it's not a technical error.

JUDGE HIGGINBOTHAM: Is it the government's position that regardless as to how egregious and unconstitutional and inappropriate and wrong our conduct may be that the savings statute would give you always the right to reindict?

MR. BRYSON: Your Honor —

JUDGE HIGGINBOTHAM: No limits? No limits is your position?

MR. BRYSON: Assuming that the indictment should not have been dismissed with prejudice, your Honor, that's correct. Now there may be cases in which the indictment should be dismissed with prejudice because of government misconduct and particularly if there is some violation of the rights of the defendant that follow from that that can't be cured in any other way.

I think as a footnote to that, I think that the *Morrison* case in the Supreme Court said that those cases will be rare in which blatant government misconduct that does not result in any kind of injury to the defendant should result in the dismissal of an indictment with prejudice. But at least whereas this Court has held, as appellants concede, in its prior decision in this case, that the indictment should not have been dismissed and indeed was properly not dismissed with prejudice.

In those cases before any cause your Honor applies this statute across the board to any error, whether it's technical, whether it's substantive, whether it's egregious. The statute should not operate, in other words, as a means to come through the back door to introduce this prejudice/no prejudice dismissal argument that was made the last time the appellants were before this Court and unsuccessfully.

Now again, if you adopt a technical error definition, the application of the statute, you get into a mire I think of problems. The line between what constitutes technical errors and what constitutes substantial errors or

substantive errors would be almost impossible to draw and I invite the Court's attention to examples that immediately come to mind. What if the Grand Jury is in fact determined to have been biased? Suppose, for example, one of the grand jurors knows the victim of the crime. Is that a technical error if it's discovered later, or is it a substantial error? Is it a substantive error? What if the prosecutor was aware that the grand juror knew the victim and didn't do anything about it? Does that convert it from a technical error to a substantial error? What if in fact there is perjured testimony before the Grand Jury? There is a case in fact in which this was precisely the error that was involved and the Court held that that was — that is the *Goldman* case — held that that was not enough to take the dismissal out of the statute, of the tolling statute.

The other examples come up. What if there is hearsay testimony before the Grand Jury? All of these things tend to make the indictment invalid on the same grounds that the indictment was held invalid in the prior Serubo case, that is that the indictment was returned by a biased Grand Jury that was not in compliance with the requirements of the Fifth Amendment that you have a fair and unbiased Grand Jury. In this case, as in each of those cases, the error may have been non-technical, but drawing the line between the kind of technical error and the kind of substantial error that they are trying to point to here would, I submit, find no basis in the statute and be almost impossible to enforce on a case-by-case basis. As I say, the policy of the statute is that Congress wanted to make sure that defendants who ought to be prosecuted against whom there were valid indictments ultimately returned should not escape simply because they filed a motion to dismiss and the time statute of limitations ran prior to the time that the Courts were able to adjudicate the motion to dismiss and rule that the first indictment was invalid.

If the Court has no further questions, thank you.

THE COURT: Thank you, counsel.

We will have the rebuttal now.

MR. MASTERSON: Thank you, sir. It seems to me that the position advanced by the government here makes absolutely no sense at all if the Court considers any canon of statutory construction, any at all. What they are saying to this Court is read this statute as if it says if an indictment is dismissed for any cause, the government has six months to reindict. It seems to me a complete answer to that is if that was what Congress intended, that's what this statute would have read. It does not read that way.

It reads as I have expressed to the Court before in basically two different clauses, one having to do with defects or irregularities with respect to the Grand Jury, and the other with respect to defects or insufficiencies of the indictment, the paper itself. It does not say defects or irregularities with respect to the Grand Jury proceedings. It does not say simply or defects for any cause.

JUDGE SEITZ: Did you want to comment on the Attorney General's letter?

MR. MASTERSON: Yes, because the Attorney General's letter, if you read it, it says —

JUDGE SEITZ: We will read it.

MR. MASTERSON: I'm sure you will. It was not quoted fully. If you read it, it says that the previous indictment is dismissed because it is defective or insufficient, and that language tracks the language in the statute and they are both words of art. Our position here is this original indictment was neither defective nor insufficient. Indeed, we pleaded guilty to it. Therefore, to argue that it was dismissed because it was defective or insufficient doesn't make any sense.

JUDGE SEITZ: You consider any factor of prejudice irrelevant in this discussion, is that right?

MR. MASTERSON: Technically, yes. Our technical position is look at the language of the statute. Look

at what happened in this case. You cannot conclude that the facts of this case fit within either of the clauses, the operative clauses of the language of the statute. That is our basic position.

JUDGE SEITZ: Thank you, Mr. Masterson. The Court will take the matter under advisement.

No. 82-2123

In the Supreme Court of the United States

OCTOBER TERM, 1983

W. THOMAS PLACHTER, JR. AND PETER J. SERUBO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 3288 and 3289, which permit the statute of limitations to be extended after an indictment has been dismissed "for any error, defect, or irregularity with respect to the grand jury," are applicable where the initial indictment was dismissed because of prosecutorial misconduct before the grand jury.

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OPINIONS BELOW

The judgment orders of the court of appeals (Pet. App. 1-2, 3-4) are not reported. The opinion of the district court (Pet. App. 5-8) is reported at 502 F. Supp. 288.

JURISDICTION

The judgments of the court of appeals were entered on April 28, 1983 (Pet. App. 2, 4). The petition for a writ of certiorari was filed on June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were initially indicted on March 13, 1978, for violations of the internal revenue laws. They were convicted in 1978, but the convictions were vacated by the court of appeals, in part because of what the court characterized as "extreme" prosecutorial misconduct before the grand

jury. *United States* v. *Serubo*, 604 F.2d 807, 818 (3d Cir. 1979). In the course of presenting the case to the grand jury, the prosecutor questioned at least one witness about petitioners' links with organized crime, making graphic references to an alleged loansharking conspiracy for which an employee of petitioners' corporation had been tried and acquitted some years earlier. *Id.* at 814-815. Since this conduct occurred before a prior grand jury panel that had not returned an indictment, the court remanded for the district court to consider whether similar statements had been made before the second grand jury, the one that first indicted petitioners.(*id.* at 818) ("The presence of an independent grand jury would satisfy our concerns to preserve both the fact and the appearance of fairness in grand jury proceedings. No more would be required to sustain the indictment".)

2. On remand, the district court directed the government to provide petitioners with grand jury transcripts of all the proceedings underlying their indictment and with any other evidence on which the government had relied in posing questions concerning petitioners' links with organized crime (Pet. 6-7). Because disclosure of this information would compromise the grand jury's investigations of other matters, the government consented to petitioners' motions to dismiss the indictment, so long as it was dismissed without prejudice (C.A. App. 114a-116a).

On April 29, 1980, the district court dismissed the original indictment without prejudice (C.A. App. 117a). Within six months thereafter the government sought and obtained a new indictment against both petitioners, relying on the "savings" provisions of 18 U.S.C. 3288 and 3289 to avoid the bar of the six-year statute of limitations contained in 26 U.S.C. 6531(1). Pet. 7-8.[1] Section 3288 provides in relevant

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[1]The last overt act in support of the conspiracy was alleged to have occurred on June 12, 1974. Thus, the statute of limitations on the conspiracy charge would have run on June 12, 1980. The limitations

part that "[w]henever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury" after the applicable statute of limitations has expired, a new indictment may be returned within six months after the dismissal and shall not be barred by the statute of limitations. Section 3289 provides for a six-month extension from the expiration of the statute of limitations if the initial indictment is dismissed within six months before the limitations period would otherwise expire.

3. Following a jury trial, petitioner Plachter was convicted on six counts of willfully attempting to evade individual and corporate income taxes for the years 1971 through 1973, in violation of 26 U.S.C. 7201, and one count of conspiracy to defraud the government and to evade income tax, in violation of 18 U.S.C. 371. Petitioner Serubo was convicted on three counts of attempted income tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced Plachter to six months in prison and five years' probation. Serubo was sentenced to six months in prison and five years' probation, and was ordered to pay all taxes, penalties, and interest in this case as a condition of probation. The court of appeals affirmed both convictions without written opinion (Pet. App. 1-2, 3-4).

ARGUMENT

The court of appeals correctly decided the issues presented. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

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periods on charges of willful attempted evasion of personal income taxes would have expired on April 17, 1978 (1971 tax year), April 16, 1979 (1972 tax year), and April 15, 1980 (1973 tax year), respectively. The statute of limitations on the charges of willful attempted evasion of corporate taxes would have run on June 15, 1978 (1971 tax year), March 15, 1979 (1972 tax year), and June 12, 1980 (1973 tax year), respectively.

Petitioners contend (Pet. 9-18) that their reindictment was untimely and that the government may not rely on 18 U.S.C. 3288 and 3289 to extend the statute of limitations because those sections apply only where an indictment has been dismissed because of a technical error in the indictment itself or because of an error in selecting or convening the grand jury, and not where, as here, an indictment has been dismissed because of prosecutorial misconduct before the grand jury. This argument has no merit.

As this Court pointed out more than 40 years ago in *United States* v. *Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 (1939), the predecessors to 18 U.S.C. 3288 and 3289 were enacted at the request of the Attorney General to safeguard the interests of the government in cases in which a timely indictment is found defective for *any cause* and dismissed after the statute of limitations has run or within six months before the statute would otherwise expire. The courts of appeals have consistently construed this statute in light of its manifest purpose of preventing a defendant, once timely indicted, from avoiding prosecution because of some error in the proceedings that could have been corrected if discovered in time. *United States* v. *Strewl*, 99 F.2d 474, 477 (2d Cir. 1938), cert. denied, 306 U.S. 638 (1939); *Mende* v. *United States*, 282 F.2d 881, 883 (9th Cir. 1960), cert. denied, 364 U.S. 933 (1961); *United States* v. *Porth*, 426 F.2d 519, 521-522 (10th Cir.), cert. denied, 400 U.S. 824 (1970); *United States* v. *Macklin*, 535 F.2d 191, 193 (2d Cir. 1976); *United States* v. *Charnay*, 537 F.2d 341, 353-354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

The fact that the original, timely indictment in this case was dismissed because of prosecutorial misconduct before the grand jury does not preclude the application of the savings provisions of 18 U.S.C. 3288 and 3289. As the court of appeals held in vacating petitioners' convictions under the first indictment, the right that was implicated by the

actions of the prosecutor was petitioners' right to indictment by an unbiased grand jury as guaranteed by the Fifth Amendment. *United States* v. *Serubo, supra*, 604 F.2d at 816. This right could be fully vindicated by presenting the case to a new grand jury without the offending allegations of links between the petitioners and persons with known connections with organized crime. See *United States* v. *Hoffa*, 196 F. Supp. 25, 31-32 (S.D. Fla. 1961) (reindictment held permissible where the original indictment was returned by a grand jury selected in violation of the Civil Rights Act of 1957). As this Court held in *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981), a case involving the right to counsel under the Sixth Amendment, "the necessity for preserving society's interest in the administration of criminal justice" makes it inappropriate to dismiss an indictment with prejudice, even if there has been a deliberate violation of the defendant's rights by government agents, if some less drastic remedy will assure the defendant due process of law and a fair trial. Here, the petitioners have had the benefit of reindictment by an unbiased grand jury. They are entitled to no more.

Petitioners rely (Pet. 16-18) on *United States* v. *Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971), and *United States* v. *DiStefano*, 347 F. Supp. 442 (S.D. N.Y. 1972), to support their contention that 18 U.S.C. 3288 and 3289 do not apply to dismissals caused by prosecutorial misconduct. This reliance is misplaced. In *Moriarty*, the court noted (327 F. Supp. at 1047; citation omitted) that the earlier indictments had been dismissed on the basis of the government's express representation that " 'the interest of justice demands no further prosecution.' "[2] Similarly, in *DiStefano*, the

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[2]Petitioners suggest (Pet. 10; citation omitted) that the government consented to dismissal of the indictment in this case " 'in the public interest.' " Unlike *Moriarty*, where the interests of justice "demand[ed] no further prosecution," the government here merely stated that

court relied (347 F. Supp. at 444) on the fact that the earlier indictments had been dismissed for failure to prosecute after the government had made a firm commitment that it would be prepared to go to trial on a date certain and then had failed to do so. In both of these cases, the governmental conduct giving rise to the dismissal of the earlier indictments was unrelated to the indictments themselves or to the grand jury proceedings, and occurred after the indictments had been returned. Here, on the other hand, the challenged conduct occurred before the original indictments were returned and, as the court of appeals held, *United States* v. *Serubo, supra*, 604 F.2d at 816, impaired the petitioners' right to indictment by an unbiased grand jury. Thus, the indictments in this case, unlike those in *Moriarty* and *DiStefano*, were dismissed because of an "error, defect, or irregularity with respect to the grand jury" and fall squarely within the savings provisions of 18 U.S.C. 3288 and 3289.[3]

"further proceedings to resolve the [petitioners'] claims of prosecutorial misconduct before the August 23, 1976, grand jury would not be in the public interest" (C.A. App. 115a-116a).

[3]Petitioners assert that "the Government's consent to the defendants' motion to dismiss the first indictment rendered it not substantively different from a dismissal initiated by the Government pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure" (Pet. 18 n.11) and that "[w]hen the Government seeks leave to dismiss an indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, neither Section 3288 nor 3289 applies" (*id.* at 17 n.9). The fact remains, however, that the district court granted a motion to dismiss the indictment because of prosecutorial misconduct before the grand jury. While the government consented to dismissal, it did not concur in petitioners' request that the dismissal be with prejudice (C.A. App. 116a; see *id.* at 119a-121a, 145a). That the government did not contest the entirety of petitioners' motion does not convert the court's action to a dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. See *United States* v. *German*, 355 F. Supp. 679, 682 n.6 (D.P.R. 1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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